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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/827,834	04/06/2001	Jeffrey John Kester	8043M	6353

27752 7590 03/12/2002

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EXAMINER	
BAHAR, MOJDEH	
ART UNIT	**PAPER NUMBER**
1617	

DATE MAILED: 03/12/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application N .	Applicant(s)	
	09/827,834	KESTER ET AL.	
	Examiner	Art Unit	
	Mojdeh Bahar	1617	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *29 January 2002* .

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-28* is/are pending in the application.

4a) Of the above claim(s) *17-22, 23 (in part), 24-26* is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-16, 23(in part), 27-28* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11)☐ The proposed drawing correction filed on _____ is: a)☐ approved b)☐ disapproved by the Examiner.

If approved, corrected drawings are required in reply to this Office action.

12)☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

13)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____ .

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

14)☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).

a) ☐ The translation of the foreign language provisional application has been received.

15)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ .
4) ☐ Interview Summary (PTO-413) Paper No(s). _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: .

DETAILED ACTION

Applicant's response to the restriction requirement and amendment submitted January 29, 2002 is acknowledged.

Applicant's election with traverse of the invention of Group I, claims 1-16, 23 (in part) 27-28 and the specie of polyol fatty acid polyesters, in Paper No. 6 submitted January 29, 2002 is acknowledged.

Applicant's remarks regarding the examination of both product (Group I) and process (Group II) claims in the same application have been considered but are not persuasive. Please note that the restriction requirement between the product and process of use herein is deemed proper as distinctness among theses inventions has been shown under MPEP 806.05(h) in the restriction requirement mailed December 7, 2001. Note that in addition to the reasons provided in the restriction requirement, these two groups are distinct because the process of lowering cholesterol can be achieved by employing a materially different product such as HMG CoA Reductase inhibitors, for example.

As discussed in the Restriction Requirement of December 7, 2001 the two Groups are drawn to two patentably distinct invention, see particularly page 3 of the Restriction Requirement. Note that the search is not limited to patent files. The search field for a composition is different from the search field for a particular method of use employing the same composition ingredients. Please note that the restriction requirement between the product and process of use herein is deemed proper as distinctness among theses inventions has been shown under MPEP 806.05(h) in the restriction requirement mailed December 7, 2001 and an unduly burdensome search has been demonstrated.

Applicant further traverses the specie election requirement. Applicant's arguments have been considered but are not found persuasive because as shown in the specie election of 12/07/01, the different species of non-digestible fats and sources thereof are classified into many different subclasses, see particularly pages 4-5 of the restriction requirement.

Because the considerations as to patentability are individual to each Group herein and the burden of search for all inventions is undue, as discussed herein and in the restriction requirement, the restriction requirement is maintained.

The requirement is still deemed proper and is therefore made FINAL.

Claims 17-22, 23 (in part) and 24-26 are withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to a non-elected invention, there being no allowable generic or linking claim.

Claims 1-16, 23 (in part) and 27-28 are examined herein on the merits in so far as they read on the elected specie.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

The factual inquiries set forth in *Graham* **v.** *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.

2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 1-16, 23 (in part) and 27-28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Jandaceck (USPN 4,005,195) Akoh and FDA announcement abstract.

Jandaceck (USPN 4,005,195) teaches food compositions comprising polyol fatty acid polyesters, see abstract, col.6, lines 30-33, example IV, and col. 9, lines 4-24. Jandaceck (USPN 4,005,195) further teaches that its compositions are useful in treating hypercholetsrolemia, see abstract, col. 3, lines 28-31.

Akoh teaches that Oatrim, an Oat-based product containing 5% beta-glucan is among fat replacers in food and can help the adherence to a low fat diet and lowering cholesterol, see abstract, page 47 and page 52 in particular. Akoh further teaches that Oatrim can be used in confectionary, desserts and baked goods, see col. 2, page 52.

FDA announcement abstract teaches that Beta Glucon soluble fiber in oats (whole, bran, rolled, flour) can lower blood cholesterol levels, see abstract.

Jandaceck, Akoh and FDA announcement abstract taken together, do not teach the combination of beta glucan and polyol fatty acid esters in a food composition and their particular amounts.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to employ beta glucan and polyol fatty acid esters in a food composition. It would have also been obvious to employ beta glucan and polyol fatty acid esters in the amounts claimed herein.

One of ordinary skill in the art would have been motivated to employ beta glucan and polyol fatty acid esters in a food composition because they are both known to have antihypercholesterolemic effects. Combining two agents which are known to be useful to have antihypercholesterolemic effects individually into a single composition useful for the very same purpose is prima facie obvious. See *In re Kerkhoven* 205 USPQ 1069. Optimization of amounts is within the purview of the skilled artisan and is therefore obvious.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Mojdeh Bahar whose telephone number is (703) 305-1007. The examiner can normally be reached on (703) 305-1007 on Monday, Tuesday, Thursday and Friday from 8:30 a.m. to 6:30 p.m.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Minna Moezie, J.D., can be reached on (703) 308-4612. The fax phone number for the organization where this application or proceeding is assigned is (703) 308-4556.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1235.

Mojdeh Bahar
Patent Examiner
March 7, 2002

MINNA MOEZIE, J.D.
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